

## MEMORANDUM OF LAW

DATE: July 14, 1986

TO: Police Department

FROM: City Attorney

SUBJECT: Background Investigation Procedure

By memorandum on March 5, 1986, Officer Robert Cruz sought our advice in the area of applicant's rights and background investigation procedure. Those questions are summarized as follows:

1. Is an applicant entitled to access to his or her background investigation file?
2. Is the Police Department required to tell an applicant why he or she was rejected, disqualified or non-selected?
3. Does the Police Department have a right to inspect an applicant's juvenile records that have been sealed?

As to your first question, the information in an applicant's background package is a public record and as such falls under the purview of the Public Records Act (PRA) (Government Code section 6250 et seq.), see, *Braun v. City of Taft*, 154 Cal. App. 3d 332, 340 (1984). In enacting the PRA, the legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Government Code section 6250; *Johnson v. Winter*, 127 Cal.App.3d 435, 437 (1982). The general policy of the PRA favors disclosure. Unless the information in a background file is exempt or the Police Department can show justification for not disclosing it, the Police Department must make the information available to the applicant. See, *Braun*, 154 Cal.App.3d at 340.

The California Appellate Court in *Johnson v. Winter*, 127 Cal.App.3d 435 (1982) addressed the issue of whether Johnson, an applicant to the sheriff's department, should be able to inspect his pre-employment investigation file. Johnson had been denied both the position and access to his file. The court in Johnson

reviewed the applicable sections of the PRA (Government Code section 6250 et seq.) and other provisions of state law (Civil Code section 1798 et seq.; Government Code section 31011; and Labor Code section 1198.5) and found a consistent public policy that individuals shall have access to records which contain information about themselves. *Id.* at 438, 439. However the court also found that there were certain exceptions for protection of confidential sources and a public interest in

protecting the right of privacy of those who communicate such confidences whether they be private employers or public agencies. Id. The Johnson court could not find as a matter of law without a factual determination that an applicant's investigation file was privileged. Id. An applicant's investigation file contains an assortment of information only some of which must be protected. Id. at 439. "¶Where nonexempt materials are not inextricably intertwined with exempt materials and are reasonably segregable, segregation and disclosure of the nonexempt materials is required." Id. at 440; Northern Cal. Police Practices Project v. Craig, 90 Cal.App.3d 116, 123-124 (1979). Any language to the contrary contained in San Diego City Attorney Opinion 81-12 should be disregarded as that opinion was written in 1981 before the issue was resolved by the court in Johnson v. Winter.

Labor Code section 1198.5 which provides authority for the disclosure of an employee's file upon request offers further support for the disclosure of an applicant's file. Section 1198.5 states in part:

(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

However section 1198.5 does not apply to records of an employee relating to a possible criminal offense nor to letters of reference. Labor Code section 1198.5(c). Further, nothing in this section shall be construed to provide "access by a public safety employee to confidential pre-employment information." ¶Emphasis added.σ Labor Code section 1198.5 (e).

Read together, Johnson v. Winter, 127 Cal.App.3d 435 (1982), Labor Code section 1198.5, and the PRA (Government Code section 6250 et seq.) offer some guidelines for determining what portions of an applicant's investigation file would properly be disclosed

or refused to the applicant. Since an applicant has the right to obtain his own criminal arrest records, (Penal Code section 11105, 11120 et seq.; 11140 et seq.; 13300 et seq.) the Johnson court reasoned that it would be unreasonable to withhold them because they were obtained with an understanding that they would not be released to the applicant. Johnson, 127 Cal.App. at 439 n.2. Matters obtained with the implicit or explicit understanding that such matters could be kept confidential need

not be disclosed. *Id.*; Labor Code 1198.5(e). Letters of reference may be privileged. Labor Code section 1198.5(c). However upon review, a court may make a factual determination that the confidentiality of the material or reference letter may be protected by not identifying the source. *Johnson*, 127 Cal.App.3d at 439-440; Civil Code sections 1798.3(d) and 1798.38.

The guidelines offered by the above sources are general in nature. Accordingly, they are of questionable pragmatic value to one charged with determining what part of an applicant's file to release. Case law has made it clear that each case must undergo an individual weighing process. "The weighing process involves what public interest is served in this particular instance in not disclosing the information versus the public interest served in disclosing the information." *Braun*, 154 Cal.App.3d at 346. Because of the ambiguous state of the law, the preferred course of action would be to provide a requesting applicant with that portion of his or her investigation file that is clearly not confidential (such as arrest records) and refuse those portions which appear to be confidential (such as reference letters).

A dissatisfied applicant's recourse is to submit a verified petition to the superior court pursuant to Government Code section 6259 requesting an order for disclosure. If the court finds the petition has merit, it will order the person charged with withholding the records to disclose the records or show cause why he should not do so. Government Code section 6259; *Johnson*, 127 Cal.App.3d at 440. At that time the representative from the Police Department should claim the material is privileged and the court will review the material in camera pursuant to Evidence Code section 915. *Id.* The court must apply the weighing process described above and determine the status of the material. The court will then order the material disclosed or returned as it deems appropriate.

Regarding your second question, a distinction must be made between an applicant whose application was rejected (disqualified) and one who successfully completed the application process but was not selected for employment. Neither instance requires an explanation from the Police Department. However, an

applicant who was rejected may appeal in writing within five (5) days of the rejection to the Civil Service Commission for a review of the ruling. The Commission must afford the applicant an opportunity to be heard. San Diego Municipal Code section 23.0306(2). At the Civil Service hearing, the applicant will have the opportunity of confronting the representative from the Police Department, and ask why he or she was rejected. The

Commission's decision on review shall be final. Id. An applicant who was merely not selected is not afforded any comparable rights by law. Thus, while neither situation requires an explanation, the rejected or disqualified applicant who pursues his or her rights to review will get an explanation at the Civil Service hearing.

Regarding your second question, a distinction must be made between an applicant whose application was rejected (disqualified) and one who successfully completed the application process but was not selected for employment. Neither instance requires an explanation from the Police Department as to the underlying reasons. However, an applicant who was rejected may appeal in writing within five (5) days of the rejection to the Civil Service Commission for a review of the ruling. The Commission must afford the applicant an opportunity to be heard on the issue of his rejection. San Diego Municipal Code section 23.0306(2).

Therefore, a police applicant who was rejected by Personnel, or whose application was returned to the Personnel Director for rejection because of information gathered during the background investigation has a right to have his or her rejection reviewed within the confines of the above cited section. An applicant who is merely not selected has no comparable rights by law. Thus, while neither situation requires an explanation by the Police Department, the rejected applicant has a right of review by the Civil Service Commission.

Finally, regarding access to sealed records, juvenile records may be sealed pursuant to Welfare and Institutions Code section 781 (juvenile proceedings); Penal Code section 851.7 (juvenile arrests without convictions); and Penal Code section 1203.45 (misdemeanor convictions). A juvenile's (or adult's) record of arrest or conviction for certain marijuana offenses may be expunged pursuant to Health and Safety Code sections 11361.5 and 11361.7. A record that has been expunged has been physically destroyed and prepared again so that it appears the expunged portion never occurred. Health and Safety Code section 11361.7(c).

There are certain exceptions which allow for the inspection of a juvenile's record that has been sealed pursuant to the above authority. Certain sections of the Vehicle Code may not be sealed from the Department of Motor Vehicles. Welfare and Institutions Code section 781; Penal Code section 1203.45. Also, sealed records may be opened by the court upon a showing of good cause in an action for defamation. Id. However, there is no

exception which allows for the inspection of a juvenile's sealed records by the Police Department as a part of a pre-employment background investigation.

An applicant whose juvenile records have been sealed or expunged may treat the sealed arrest or conviction as if it never occurred and may answer any questions relating to the event accordingly. Welfare and Institutions Code section 781(a); Penal Code sections 851.7(b) and 1203.45(a). Thus, even if the Police Department becomes aware of an applicant's sealed juvenile record, (i.e., a neighbor reveals it) they cannot reject that applicant because of the record, nor for untruthfulness if the applicant denied the events took place. See *Tietgen v. City of Pomona*, 176 Cal.App.3d 753 (1986).

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